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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Petitioner*,

v.

ALLAN BAKKE, *Respondent*.

On Writ of Certiorari to the Supreme Court of California

BRIEF AMICI CURIAE

For:

National Council of Churches of Christ in the United States of America
American Coalition of Citizens with Disabilities
Americans for Democratic Action
American Federation of State, County and Municipal Employees, AFL-CIO
American Public Health Association
Children's Defense Fund
International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC (IUE)
International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW)
Japanese American Citizens League
Mexican-American Political Association
National Council of Negro Women
National Education Association
National Health Law Program
National Lawyers Guild
National Legal Aid and Defender Association
National Organization for Women

(Listing continued on page 2 of cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

National Urban League
United Farm Workers of America, AFL-CIO
United Mine Workers of America
United States National Student Association
Young Woman's Christian Association

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Dated: June 7, 1977

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Mexican-American Political Association
National Council of Negro Women
National Education Association
National Health Law Program
National Lawyers Guild
National Legal Aid and Defender Association
National Organization for Women
National Urban League
United Farm Workers of America, AFL-CIO
United Mine Workers of America
United States National Student Association
Young Woman's Christian Association

INTEREST OF AMICI

Amici are a coalition of national organizations committed to assuring that members of disadvantaged minority groups enjoy the full benefits of American life, including adequate health care. *Amici* include religious, professional, labor, health and public service organizations, as well as groups devoted to the rights of children, women and the handicapped. A description of each of the *amici* is set forth in the Appendix. *Amici* believe that the decision of the California Supreme Court in this case, if affirmed, would constitute a serious setback to this nation's efforts to include minority group members among those who receive a professional education, and to increase thereby the availability of desparately needed services in minority communities.[1]

CONSENT OF THE PARTIES

This brief *amici curiae* in support of the petitioner is filed with the consent of both parties.

QUESTION PRESENTED

Where color-blind academic admissions standards result in the near total exclusion of minority applicants from a public medical school, does the Fourteenth Amendment forbid the school from taking race into account so as to include minorities in its student body?

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[1] Several of the *amici* joined in a brief *amici curiae* in opposition to the grant of certiorari in this case. The brief argued that, for various procedural reasons, the merits of this case should not be decided in this Court. Those *amici* adhere to the position there expressed. See also Supplemental Memorandum of *Amici Curiae*, arguing that a recent amendment to the California Constitution provided an adequate state ground for the decision below, and provided further reason for this Court to decline to consider the federal constitutional issue presented. These arguments are also addressed in the Brief *Amicus Curiae* of the National Conference of Black Lawyers.

STATEMENT

The civil rights struggles of the sixties focussed America's consciousness on the severe deprivations that resulted from centuries of discrimination and neglect. As a Nation, we came to understand that the eradication of the effects of discrimination required, not passivity or neutrality, but a measure of "distributive justice"—positive steps to include minorities in the benefits of American life.[2]

Prior to the adoption of the so-called special admissions programs, there were only token numbers of minority students enrolled in most professional schools. This situation paralleled the sparsity of professional services in minority communities. The problem was not the unavailability of minority college graduates qualified for professional study, but the nature of the prevailing admission process. Admissions to professional schools were granted on a competitive basis, largely by reference to the college grades and standardized test scores of the respective applicants. In the 1960's, there was an enormous increase in the number of applicants to professional schools in this country. As a result of this increase, and not because of any policy decisions by the schools, the grade and score levels of those admitted also sharply increased. See Brief for Sanford H. Kadish, et al., in Support of the Petition for a Writ of Certiorari, at pp. 7-12. Although there were available substantial numbers of minority candidates whose grades and scores would have entitled them to admission a few years earlier, very few minority candidates met the new standards that had developed through the inexorable force of competition. This sit-

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[2] *See generally* Hentoff, The New Equality (1964); Rawls, A Theory of Justice (1971).

uation was undoubtedly attributable, at least in substantial part, to racial discrimination in primary and secondary public education. See note 20, *infra*.

In the late sixties and early seventies, most of the major professional schools in the United States decided that it was in their interest and in the interest of society at large to do something to include minorities in their student bodies. Special programs were adopted under which minorities are admitted who do not meet the score and grade standards set by the performance of the top group of applicants. It would be erroneous, however, to conclude that the minorities so admitted are "less qualified" than whites who are rejected. To do so would assume that qualifications can be measured only by reference to traditional numerical criteria. But these criteria, at best, have only limited utility in predicting academic performance and none in predicting professional performance.[3]

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[3] The two primary criteria in medical school admissions are Medical College Admission Test (MCAT) scores and grade point average in college (GPA).

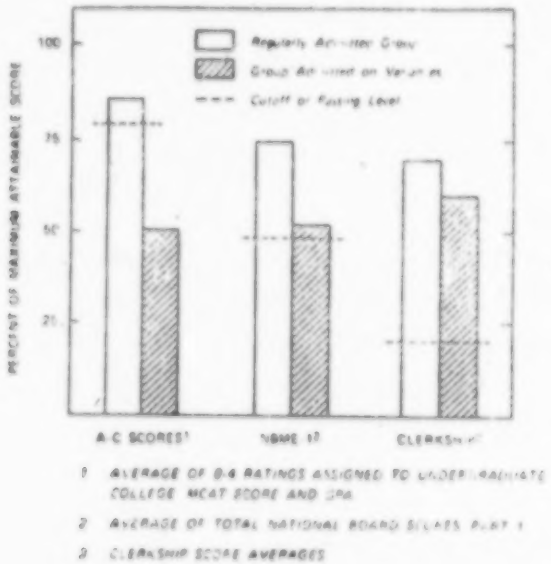
The MCAT examination was developed in 1946 by the Association of American Medical Colleges to help identify students who would successfully complete medical school. It does not purport to predict which applicants would perform successfully as practicing physicians. Erdman, "Separating the Wheat from Chaff: Revision of MCAT", 47 Journal of Medical Education, 747-49, (1972). In fact, studies have consistently shown that MCAT scores correlate well only with performance in the first year of medical school and correlate insignificantly or not at all with success in the remainder of medical school, and particularly in clinical studies. See, Best, *et al.*, "Multivariate Predictors in Selecting Medical Studies", 46 Journal of Medical Education 42-50 (1971); Turner, *et al.*, "Predictors of Clinical Performance", 49 Journal of Medical Education 338-42 (April, 1974); Conger and Fitz, "Prediction of Success in Medical School", 38 Journal of Medical Education 943-7 (Nov. 1963).

The MCAT examination is structured to measure specific factual knowledge in science, verbal skills and general information. Failure of medical school applicants to score well reflects inadequate prior education and does not provide a measure of intellectual potential. A.C. Epps, "The Howard-Tulane Challenge: A Medical Education Reinforcement and Enrichment Program", 64 Journal of the National Medical Association 317-24, 330 (July 1972).

Other studies have shown that college grades also do not serve as a good indicator of success in clinical studies or of effective performance in practice. See Weisman, *et al.* "On Achieving Greater Uniformity in Admissions Committee Decisions", 47 Journal of Medical Education 593-602 (1972); P.B. Price, *et al.* "Measurement of Physician Performance: Discussion" 39 Journal of Medical Education 203-11 (1964).

The following table shows the continual dissipation of the differences in performance of special and regular admittees during the course of medical school.

Because of the exclusionary effect on minorities of the application of these academic criteria and because



Comparisons at admission and on preclinical and clinical performance indicators

Simon, *et al.*, "Performance of Medical Students Admitted Via Regular and Admissions-Variance Routes", 50 Journal of Medical Education 232, 240 (1975). The inutility of the traditional criteria in predicting performance as a doctor, or even overall medical school performance, severely undercuts any applicant's claim of entitlement to admission on the basis of his "qualifications".

of their limited value, professional schools concluded that the concept of equal protection required the development of modes of access that would dissipate in some part the effects of past discrimination. To this end, many professional schools opted to select qualified minorities by reference to non-academic, as well as academic, criteria that would more broadly reflect the ability of minority applicants to learn and practice the profession, and the likelihood that their admission would contribute to the solution of the problems presented by the relative unavailability of professional services in minority communities. A recent study has shown that ninety (90%) per cent of the minority students admitted to medical school despite their lower academic scores have graduated. *This is a higher success rate than that of white medical students during the same period.*[4] And minority graduates in substantial numbers are practicing in a manner that provides medical services to disadvantaged communities.[5]

In all instances to our knowledge, the admission of minorities, pursuant to a special admissions procedure, has still afforded whites the large preponderance of the admissions places, and, indeed, more places than their proportion of the population in the areas served by the school.[6] Thus, programs to include minorities have

[4] Johnson, et al., "Retention by Sex and Race of 1968-72 U.S. Medical School Entrants," 50 Journal of Medical Education 925 (1975).

[5] See p. 13, n. 18, infra.

[6] In 1975-76, eight (8%) per cent of the medical students in the United States were black, Chicano and Indian, as compared with a sixteen (16%) per cent representation of these groups in the population at large. Kalida & Craig, "Minority Physician Practice Patterns and Access to Health Care Services", 2 Looking Ahead 1 (Nov./Dec. 1976). In 1974, four Chicanos were admitted

been moderate and have resulted only in a marginal limitation in the likelihood of the admission of a white applicant.

Amici believe that the Fourteenth Amendment does not prohibit the special admissions program at the Davis Medical School. Just as the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics", *Lochner* v. *New York,* 198 U.S. 45, 75 (Holmes, J., dissenting), it does not enact the values of competitive selection. The requirements of equal protection do not prohibit a state from considering the needs of the society and the needs of minorities in distributing the valuable resource of a professional education. See Sandalow, Racial Preferences in Higher Education, 42 U. Chi. L. Rev. 653, 674, 692 (1975).

ARGUMENT

I. PROGRAMS TO INCLUDE MINORITIES IN PUBLIC PROFESSIONAL SCHOOLS ARE NOT "SUSPECT" OR "PRESUMPTIVELY UNCONSTITUTIONAL".

The fundamental analytical error of the court below was its conclusion that the petitioner's special admissions program created a "suspect" classification, subject to review under a "strict scrutiny" standard. Thus, the University's voluntary efforts to further racial equality were misjudged by standards developed to protect disadvantaged minorities from majoritarian

to Davis Medical School under the Regular Admissions program and thirteen Chicanos and blacks were admitted under the Special Admissions program, Petition for Certiorari, p. 6, for a total of 17 out of 100 places. The Chicano and black population of California is approximately 22%. U.S. Dept. of Commerce, Bureau of the Census, 1970 Census of Population, California, General Population Characteristics, PC(1)-B6, p. 6-89 (1971).

governmental action that stigmatizes, separates, injures or discriminates against them on the basis of race. See, *e.g.*, *Korematsu* v. *Morgan*, 384 U.S. 641 (1966); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Anderson* v. *Martin*, 375 U.S. 399 (1964).

Apart from the decision below, the strict scrutiny doctrine has never been applied to thwart governmental efforts to redress deprivations suffered by minorities. To the contrary, this Court's decisions make clear that a classification is "suspect" only when it disadvantages a class entitled to special protection under the Fourteenth Amendment. A classification designed to benefit a disadvantaged class in their efforts to overcome the effects of past discrimination, and which incidentally limits in a small way the benefits available to everyone else, is not a "suspect" classification and is not subject to "strict scrutiny."

For example, in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), this Court held that population groups disadvantaged by a Texas school financing scheme were not a "suspect" class, entitled to review under a strict scrutiny standard. The Court explained that the class had:

> . . . none of the traditional indicia of suspectness: the class is not saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process.

411 U.S. at 28.[7] See *Califano* v. *Goldfarb*, 97 S.Ct. 1021, 1032-33 (1977). (Stevens, J., concurring); *Id.* at 1036 (Rehnquist, J., dissenting). The class of white applicants for admission to the Davis Medical School also have "none of the traditional indicia of suspectness," and government action that indirectly limits their opportunities by assuring the inclusion of minorities is not presumptively unconstitutional.[8]

In several instances, this Court has upheld race conscious measures designed to eradicate or redress discrimination against protected minorities. E.g., *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); *United Jewish Organiza-*

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[7] This description also applies to women. See *Frontiero* v. *Richardson*, 411 U.S. 677, 685-86 (1973).

In *Rodriguez*, the Court also held that the right to a public school education is not a "fundamental right"—another indicia of the applicability of a strict scrutiny standard. If public school education is not a fundamental right, then, of course, a medical school education is not a fundamental right.

[8] This distinction in standards applicable to racial classifications based on the purpose of the classification and the identity of the beneficiaries is implicit in the decision of this Court last Term in *United Jewish Organizations of Williamsburg* v. *Carey*, 97 S. Ct. 996 (1977). There, the Court upheld, against a Fourteenth Amendment challenge, legislative districting along racial lines designed to create substantial black majorities in several election districts, at the expense of the voting strength of certain white citizens. The Court reached this conclusion without denominating the classification as "suspect" or invoking the strict scrutiny standard. While there was no opinion of the Court, opinions reflecting the views of several members of the majority emphasized the lack of racial animus, and, indeed, the benign purpose of the legislation. See *Id.* at 1009-10 (White, J.), 1016-17 (Stewart, J.). See also *Washington* v. *Davis*, 426 U.S. 229 (1976).

tions v. *Carey*, 97 S.Ct. 996 (1977). In *Morton* v. *Mancari*, 417 U.S. 535 (1974), this Court unanimously upheld, against an equal protection challenge, a statute which requires the Bureau of Indian Affairs to give a preference in hiring to Native Americans. These decisions are entirely inconsistent with the notion that racial classifications are "suspect" or "presumptively unconstitutional," where their purpose is to redress disadvantage and discrimination. Rather, in that situation, the normal presumption in favor of the constitutionality of state action should be applied.

II. THE UNIVERSITY'S SPECIAL ADMISSIONS PROGRAM MEETS EVEN THE STRICTEST STANDARD OF REVIEW.

For the reasons stated, *amici* believe this Court should explicitly reject the notion that governmental efforts intended to assist minorities in achieving full equality should be viewed as presumptively unconstitutional and tested under a compelling interest standard. Nevertheless, the program in this case meets even the strictest standard of review. The Davis Medical School's efforts to include minorities in its student body is justified by a compelling social interest.

As a result of pervasive historic discrimination, there is a vast underrepresentation of certain minorities among physicians in the United States today. President Lyndon B. Johnson sounded the keynote for affirmative action:

> Consider this fact: Among white citizens one American in 670 becomes a doctor, but among Negroes . . . it is one in 5,000. . . . That is just not right. That is a tragedy. That is a complete, absolute indictment of our entire educational system and I am going to say so here today.
>
> We must recruit more talented Negro students for the medical profession. We must assist more institutions to educate more Negro doctors, Negro dentists, Negro nurses, and Negro technicians.

Speech, National Medical Association (Houston, Texas April 14, 1968), quoted in 61 Journal of the Nat'l Medical Ass'n 82 (1969). In 1972, when 12% of all Americans were black, only 4,478 or 1.7% of the 320,903 active physicians were black. There was one physician for every 649 persons in the general population; but only one black physician for every 4,298 blacks.[9] The ratio of black physicians to black population actually worsened between 1942 and 1972, because the increase in the number of black physicians did not keep pace with the increase in the black population.[10]

Before special admissions programs were inaugurated in medical schools throughout the United States, minority enrollment promised no improvement in this situation. In the 1969-70 academic year, there were a total of 1,042 black students enrolled in medical schools throughout the country, or 2.8% of total enrollment—not significantly more than the black proportion of active physicians. There were then 18 American-Indians in medical schools, .04% of total enrollment, and 92 Mexican-Americans, .2% of total enrollment.[11]

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[9] T. Thompson, "Curbing the Black Physician Manpower Shortage," 49 Journal of Medical Education 944 (Oct. 1974).

[10] *Id.*

[11] Association of American Medical Colleges, Medical School Admission Requirements, U.S.A. and Canada, Ch. 6 (Wash. D.C. 1975).

As a result of special admissions programs, there has been a substantial increase in minority enrollment, but still far below the proportions of these groups in the population at large. By the 1974-75 school year, the percentage of black medical students rose to 6.3%, of American-Indians to 0.3% and of Mexican-Americans to 1.2%.[12]

The Davis Medical School opened in 1968. *In that year there were no black or Chicano students in the school.* From 1970-1974, fifty-seven black and Chicano students were admitted under special admissions, but only seven were admitted under the regular admissions program. Petition for a Writ of Certiorari, pp. 5-6. It is thus clear that absent special admissions, there would be only token black and Chicano enrollment in the medical school today.

There is a health care crisis in disadvantaged minority communities in California and throughout the United States. The infant mortality rate for black babies in America is almost double that of whites, and, in fact, approximates the rates in the developing countries.[13] The maternal mortality rate for blacks is three times that for whites, and is on the rise.[14] Minority babies who survive birth are twice as likely as white

[12] *Id.* See also, Johnson, et al., "Recruitment and Progress of Minority Medical School Entrants, 1970-74", 50 Journal of Medical Education 721 (1975).

[13] Darity, "Crucial Health and Social Problems in the Black Community", Journal of Black Health Perspectives, June/July, 1974 at 34.

[14] U.S. Dept. of Commerce and Labor, The Social and Economic Status of Negroes in the United States, 1970, Special Studies, Bureau of the Census, at 98.

babies to die in infancy.[15] White life expectancy is substantially higher.[16] The figures go on and on.[17]

Studies have established that minority professionals tend, to a very substantial extent, to practice in minority communities, and that they do so to a far greater extent than do white doctors.[18] And, of course, statisti-

[15] Spruce, "Toward a Larger Representation of Minorities in Health Careers", 64 J. Nat'l Med'l Ass'n 432 (1972).

[16] Darity, *op. cit. supra.* See U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1971 at 53.

[17] The critical shortage of doctors in ghetto communities exacerbates the health problems of minorities. Far fewer doctors are willing to work in inner city neighborhoods than in more affluent areas. For example, in 1976, the physician-to-patient ratio was 73 per 100,000 in Central Harlem, as compared to 222 per 100,000 in New York State as a whole. T. Thompson, "Curbing the Black Physician Manpower Shortage", 49 Journal of Medical Education, 944-50 (Oct. 1974); See also, B. Roth, "Patient Dumping" Health/PAC Bulletin #58: 6-10 (May/June 1974); Health Policy Advisory Center, "Your Health Care in Crisis" (New York: Health/PAC 1972); A.R. Somers, "Health Care in Transition; Direction for the future" (Chicago: Hospital Research and Educational Trust, 1971).

[18] A study of the practice patterns of two graduating classes at two predominately black medical colleges—Howard University and Meharry Medical College (Nashville, Tennessee)—revealed that 36% of all graduates accepted intern and resident positions in governmental hospitals serving the poor, as compared with 13% of all medical school graduates. Kaleda & Craig, "Minority Physician Practice Patterns and Access to Health Care Services", 2 Looking Ahead 1, 5 (Nov./Dec. 1976). See also H. Tilson, "Stability of Employment in OEO Neighborhood Health Centers," 11 Medical Care No. 5 (1973). Kaleda & Craig also found that a far higher proportion of the graduates of these schools than of all medical colleges chose to locate in Central City communities which have the largest concentrations of minority residents. Kaleda & Craig, *op. cit. supra,* p. 4, Table 2. Another study found that approximately two-thirds of the patient care of Howard University graduates was provided to blacks. Johnson, "Highlights

cal likelihood is enhanced by expressed intention. Every single student admitted to Davis under the special admissions program expressed an intention to serve disadvantaged communities upon graduation. C.T. 68: 14-16. Given the direct link between minority physicians and improved delivery of health care services in minority communities, there is obviously a compelling societal interest in programs to include minorities in medical college.

There are other compelling reasons for special admissions at Davis.

First, there is the essential fairness, in a state with a 22% black and Chicano population,[19] to include minority students in a publicly supported medical school.

Second, the admission of minorities diversifies the student body and permits faculty and students alike to derive the benefits of an integrated education, inclusive of minority group students who have a special appreciation for the customs, habits and medical needs of their own people.

> The purpose of racial integration is to benefit the community as a whole, not just certain of its members.

Otero v. *New York Housing Authority,* 484 F.2d 1122, 1134 (2d Cir. 1973).

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of Medical Alumni Survey," Howard University Medical Alumni Association 4 (Feb. 1977). See generally Jackson, "The Effectiveness of a Special Program for Minority Group Students," 47 Journal of Medical Education 620-24 (Aug. 1972). A recent U.S. government study revealed that 87% of the medical visits of black patients were to black doctors. National Ambulatory Medical Care Survey, 1975, National Center for Health Statistics, Unpublished Data, (U.S. Dept. of H.E.W., 1975). See also, Briefs *Amici Curiae* of the Mexican-American Legal Defense Fund and the California State Department of Health.

[19] See note 6, *supra.*

Third, increased numbers of minority professionals is a countervailing force to racial polarization, because minority professionals are a source of leadership to minority communities, and are able to assume positions of importance and power in the society at large. Moreover, to black and Chicano youths, professionals of their own race, and functioning in their own communities, serve as role models, and demonstrate the feasibility of educational and professional advancement.

This Court has approved race conscious measures designed to overcome the legacy of discrimination against minorities.

> The Board of Education, as part of its affirmative duty to disestablish the dual school system, properly took into account the race of elementary school children in drawing attendance lines. To have done otherwise would have severely hampered the board's ability to deal effectively with the task at hand.

McDaniel v. *Barresi,* 402 U.S. 39, 41 (1971). See *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); *Morton* v. *Mancari, supra; United Jewish Organization* v. *Carey, supra. Cf. Lau* v. *Nichols,* 414 U.S. 563 (1974). And the lower courts have upheld race conscious hiring programs adopted pursuant to the Affirmative Action requirements of Executive Order 11246. *Associated General Contractors* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Contractors Association* v. *Schulz,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

> [Colorblindness] has come to represent a long term goal. It is by now well understood, however, that our society cannot be completely colorblind in

> the short term if we are to have a colorblind society in the long term

Associated General Contractors v. *Altshuler, supra,* 490 F.2d at 16.

The Court below suggested that race conscious measures are not permissible unless there has been a history of past discrimination and unless the remedy is imposed by the Courts after a finding of unlawful conduct. 553 Pac.2d at 1168-69. But reason does not support such a rule and there are strong reasons to the contrary.

It may be that in this case the Davis Medical School did not itself practice racial discrimination prior to the adoption of its special admissions program, but the Medical School is an agency of the State of California. And, as the briefs *amicus curiae* of the NAACP Legal Defense Fund and the Bar Association of San Francisco County, *et al.* make clear, there has been substantial racial discrimination against minorities in California in connection with elementary and secondary education.[20] In cannot reasonably be doubted that the relative absence of minorities in the Davis student body prior to the adoption of the special admissions program was a result of this discrimination. In these circumstances, the Fourteenth Amendment gives wide

[20] State and federal courts in California have found racial segregation and discrimination in the schools of the state's largest cities. See *e.g., Johnson* v. *San Francisco Unified School District,* 339 F. Supp. 1315 (N.D. Cal. 1971), *rev'd in part on other grounds,* 500 F. 2d 349 (9th Cir. 1974); *Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal. 1974) (denial of modification of decree) *aff'd,* 519 F. 2d 430 (9th Cir. 1975), *rev'd on other grounds,* 427 U.S. 424 (1976); *Soria* v. *Oxnard School District,* 386 F. Supp. 539 (C.D. Cal. 1974) (Los Angeles); *Jackson* v. *Pasadena City School District,* 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963).

range to voluntary measures designed to include minorities in the medical college.

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court.

Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971).

There is no reason for prohibiting voluntary corrective steps until a lawsuit has been instituted, defended and lost. This Court has recognized that the remedial or benign purpose of disparate treatment supports a finding of constitutionality, without reference to legal liability for past discrimination. See *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Califano* v. *Goldfarb,* 97 S.Ct. 1021, 1028, n. 8 (1977) (plurality opinion).

Moreover, our national efforts to eradicate racial discrimination recognize the desirability of voluntary corrective efforts. See, e.g., 42 U.S.C. § 2000e-5(6). Voluntary action comes about without the expense and animosity of litigation and judicial findings of invidious discrimination. More importantly, a principle of correction only through litigation imposes the burden on disadvantaged minorities to marshall the resources to institute and successfully prosecute what is often

very expensive, protracted and complicated litigation. It may seem that the federal courts are flooded with lawsuits seeking to redress racial discrimination, but the fact is that most valid claims are not litigated because of these practical factors.[21] Redress through litigation also imposes a heavy burden on the courts and on the defendants. A rule limiting affirmative action to litigated cases and court imposed injunctions would frustrate and not further the purposes of the Fourteenth Amendment.

Where a university determines voluntarily to redress a near-total absence of minority group members from its student body, its efforts should be welcomed and not denied. Whites are accorded more places in the Davis Medical School than their proportion of the California population. Nothing in the constitution demands the virtual exclusion of minorities in pursuit of a policy of Social Darwinism.

III. THERE ARE NO REALISTIC ALTERNATIVES TO A RACE CONSCIOUS SPECIAL ADMISSIONS POLICY AS A MEANS OF INCLUDING MINORITIES IN THE DAVIS MEDICAL SCHOOL.

As discussed above, the court below applied the "strict scrutiny" equal protection test in this case. Although that court was willing to assume that the Davis special admissions policy is justified by a compelling state interest, 553 Pac. 2d at 1165, it invalidated the policy on the ground that the state's interest could be served without resorting to race conscious admissions. *Id.* Because, under this Court's decisions, the strict scrutiny test should not be applied to a benign

[21] See H.R. Rep. No. 94-1558, pp. 2-3 (94th Cong., 2d Sess.) (1976).

policy intended to help overcome the present effects of past discrimination against minority groups, it is not the University's burden to establish that there are no colorblind means of achieving the same purpose. Where the strict scrutiny standard is not applicable, it is not for the courts to weigh the desirability of alternative policies that might have been adopted by state officials. If the policy adopted by the state is justifiable, that is the end of the inquiry.

But apart from the invalidity of the inquiry into possible alternatives, we think it clear that the alternative policies suggested by the California Supreme Court would each be ineffective or impractical. None is in any sense supported by the record in this case or by any empirical experience.

First, the lower Court suggested additional recruitment of minorities. *Id.* at 1166. The Medical School already engages in intensive minority recruitment, and there is simply no reason to believe, and indeed every reason to doubt, that additional recruitment would produce minority candidates who meet regular admissions standards.

Next, the California Court suggested that the size of the school be expanded in the hope that a larger entering class would include a large number of minorities. *Id.* But the expansion of medical school facilities is enormously costly, and funds for this purpose have not been made available. Moreover, given the more than 3,700 applications for the 100 spaces in the 1974 entering class at Davis and the large number of white candidates with excellent credentials, it is doubtful that even doubling of the size of the medical school would have any significant impact on regular minority admissions. Rather, it seems probable that the increase in regular minority admissions would be proportionate to the in-

crease in the size of the school, so that the size of the school would have to be multiplied many times before any substantial number of minority candidates would be admitted by regular admissions. This is not a practical approach.

The California Court placed most emphasis on a policy of affording special consideration to economically "disadvantaged" applicants rather than to minority applicants. *Id.* But many black applicants are not "disadvantaged" in terms of economic status, and most economically disadvantaged applicants are white. See Sandalow, *op. cit. supra,* at p. 692, n. 113. This approach would cut off the source of many of the most qualified black applicants—those from middle class families who are most likely to seek professional training—and require the admission of large numbers of additional white applicants to achieve the goal of more minority students. This approach would be awkward, unmanageable and of dubious efficacy in achieving the goal of increased numbers of minority professionals.

Lastly, the California Court suggested more flexible admissions standards, which would emphasize personal interviews, recommendations and other non-score data. *Id.* But unless such a program is intended to provide a mechanism for surreptitious consideration of race, there is no reason to believe it would significantly increase the admission of minority candidates. There are white as well as black candidates with impressive non-score credentials, and many of the whites have impressive score credentials as well. Given the great preponderance of whites among the applicant pool, it seems reasonable to conclude that a truly non-racial implementation of such a program would not significantly increase admissions of minority candidates.

We submit that Davis' special admissions policy is narrowly drawn, is fair to white applicants, and is effective to achieve a compelling state purpose. It should not be discarded in favor of indirect procedures that would radically alter the school or its regular admissions policy, and that are of questionable value in increasing the admission of minority students.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

The National Council of Churches of Christ in the United States of America is the cooperative agency of 30 national Protestant and Eastern-Orthodox religious denominations with an aggregate membership of over 40 million people. The National Council of Churches of Christ is organized exclusively for religious purposes and it is committed to promoting the application of the law of Christ in every sphere of human relations. In light of the Council's historic involvement in the struggle for racial justice and its interest in promoting equal educational opportunities for all, regardless of race, ethnic background, sex, or economic condition, the National Council of Churches of Christ has joined this brief.

The American Coalition of Citizens with Disabilities (ACCD) is a nationwide organization composed of both disabled and non-disabled individuals and of local, state and national organizations dedicated to assisting disabled people. ACCD works on behalf of its thousands of members to obtain improved education, expanded rehabilitation programs, accessible housing, effective transportation and extensive employment opportunities and to end discrimination on the basis of disability.

The Americans for Democratic Action, founded in 1947, is an organization of individuals that has devoted itself to the cause of civil rights for all. Over the past three decades, it has worked for the enactment of civil rights legislation and for the promotion of equal opportunity through every branch of government and in all walks of life.

The American Federation of State, County and Municipal Employees, AFL-CIO, is the largest public sector labor organization in the United States, with a membership of more than 750,000 persons, almost all of whom are employed by state and local governments throughout

the nation. AFSCME is deeply concerned with the achievement of equality in America. Its members, as public employees and as citizens, are committed to the principle of affirmative action toward equal opportunity by public institutions.

The American Public Health Association is a national non-governmental organization established in 1872. Its objective is to protect and promote personal and environmental health. With a membership of over 50,000 health professionals, including 51 affiliated organizations, it is the largest public health organization in the world. APHA's primary purpose is to develop a national health policy to provide equitable, low-cost, quality health care for all citizens. Since 1973, the Association has pursued a policy of working with educational institutions to increase the number of minority health professionals by developing and expanding affirmative action programs.

The principal aim of the Children's Defense Fund of the Washington Research Project is to assist in achieving equality of opportunity for all citizens by public education, monitoring of agency programs, negotiation and litigation. Established in 1968, the Project is deeply concerned with educational issues, particularly those dealing with alleviating the continuing effects of racial discrimination in public schools. The Project has conducted a number of studies of federal desegregation policies and the impact of federal aid to education. These studies include higher as well as primary and secondary education to ensure that the national commitment to end discrimination is fulfilled. In 1973, the Project complemented these efforts with a broader focus on children's rights, seeking systematic reforms on behalf of all the nation's children, with special attention to the unique problems of minority and poor children.

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC (IUE) has over 285,000 members

throughout the Nation, 100,000 of whom are women, and many of whom are members of disadvantaged minority groups. The IUE is a leader among unions in championing the civil rights of its members. It has instituted numerous suits under federal and state fair employment laws, and has filed many charges of discrimination with administrative agencies. The IUE believes that affirmative action is an indispensable tool toward the elimination of the legacy of discrimination.

The International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) is the largest industrial union in the world, representing approximately a million and a half workers and their families. Including spouses and children, UAW represents more than 4½ million persons throughout the United States and Canada. The UAW, which is deeply committed to equal opportunity and anti-discrimination, does much more than bargain for its members. It is active in civic affairs and citizenship and legislative activities. It is by mandate of its Constitution and tradition deeply involved in the larger issues of the quality of life and the improvement of democratic institutions. The questions presented by this case vitally affect the UAW and its members.

The Japanese American Citizens League (JACL) is a national organization comprised of 105 local chapters with over 30,000 members in 32 states. Since its official organization in 1930, JACL has been dedicated to the promotion of the welfare of its members and to the broader goal of the protection of the rights of all Americans. Having suffered through one of the most intense periods of discrimination in the modern history of the United States—the exclusion of over 100,000 persons of Japanese descent from the West Coast during World War II—Japanese Americans are acutely aware of the potentially invidious and unjust consequences of governmental programs based

exclusively upon race. However, JACL is joining in this brief because it believes that it is imperative that affirmative efforts be made to increase educational opportunities for individuals who are disadvantaged because of race.

Mexican-American Political Association (MAPA) is a non-profit corporation, founded in 1960, for the purpose of increasing Mexican-American participation in the American political process. The organization concentrates its energies on promoting legislation effecting Mexican-Amricans such as voting rights, education and affirmative action. MAPA has chapters throughout California and the southwest.

The National Council of Negro Women, founded in 1935, is a coalition of twenty-seven national organizations. It is committed to improving opportunities for black women and their children. The issues in this case vitally concern its constituent organizations and their members.

The National Education Association, founded in 1857 and chartered by a special act of Congress in 1906, is the nation's oldest and largest organization of educators. It's current membership of 1,500,000 persons includes more than 44,300 members employed in higher education. The NEA believes that our nation's educational institutions, at all levels, should reflect the diversity of our society and that the presence of significant numbers of minority students in professional schools will have the salutary effect of motivating minority students to aspire to professional careers and of promoting greater racial education, and harmony.

The National Health Law Program is a legal service corporation support program for the poor. Its functions include litigation, legislative analysis, administrative enforcement and education of attorneys, health workers and policy makers on behalf of low income health consumers. Since its founding in 1970, a key component of its litigation

effort has been to assure access to health care by minorities and the poor.

The National Lawyers Guild is an organization founded in 1937 with over 5,000 members. It works to maintain and protect civil rights and civil liberties.

The National Legal Aid and Defender Association (NLADA) is the national organization of public defense and legal services offices. Its constituency is the indigent population served by attorneys from these offices. Founded in 1911 by 15 legal aid societies, NLADA today has over 1,500 member programs with approximately 6,000 participating attorneys, including, the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. NLADA seeks to enlist the support of the bar and the general public on behalf of equal access to legal representation.

The National Organization for Women (NOW) is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 56,000 with over seven hundred chapters throughout the United States.

The National Urban League, Inc., is a charitable and educational organization organized as a not-for-profit corporation. For more than 65 years the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, by fostering better race relations and increased understanding among all persons, and by implementing programs approved by the League's interracial board of trustees. The League has concluded from its experience in manpower training, placement of minority professionals and other employment related programs that special measures are required to overcome the damage done by long-term racism and prejudice.

The United Farm Workers of America, AFL-CIO, is an unincorporated association which functions as a trade union on behalf of farm workers. In addition to its interest in wages, hours, and working conditions, it is vitally interested in the social betterment of its members and particularly in their obtaining higher educational opportunities.

The United Mine Workers of America (UMWA) is a labor organization representing coal miners. Throughout the United States the UMWA has been in the forefront of the nation's struggle for equal opportunity in employment and it is dedicated to the principle of equal opportunity in every walk of American life.

The United States National Student Association, founded in 1946, represents Colleges, Universities, County and Junior College Students throughout the Nation. Historically, NSA has had a commitment to Civil Rights, including the right of access to quality education for racial and ethnic minorities.

The Young Woman's Christian Association (YWCA) is the oldest and largest women's membership movement in the United States. It is a part of the world YWCA organization, which operates in 83 countries, and is dedicated to helping women and girls put into practice the ideas of peace, justice, freedom and dignity for all people. One of the YWCA's overriding priorities is the elimination of racism.